

OFFICIAL FILE

ORIGINAL

ILLINOIS COMMERCE COMMISSION

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS
COMMERCE COMMISSION

2004 MAY 27 A 11:26

CHIEF CLERK'S OFFICE
SM

Illinois Commerce Commission

On Its Own Motion

-vs-

KMS Morris Power, Inc.

03-0607

Investigation of compliance with Order
granting QSWEF status.

RESPONDENT'S APPLICATION FOR REHEARING

Respondent, LePetomane VI, Inc., (the "Receiver") not individually, but solely as Receiver for KMS Morris Power, Inc. ("KMS Morris"), by and through its counsel, Louis D. Bernstein and Theodore F. Kommers, pursuant to 83 Illinois Administrative Code Section 200.880, applies for rehearing of the Commission's Order dated April 27, 2004 (the "Order") and states as follows:

The Receiver applies for rehearing with respect to the following issue:

ISSUE: Whether it is appropriate for the Commission to adjudicate the amount of tax credits allegedly owed by KMS Morris to the State and enter a judgment against KMS Morris in that amount in the absence of a request for monetary relief by Staff or contemplation of a monetary award by the Commission in its Initiating Order?

ANSWER: No. Entry of a monetary judgment against KMS Morris in excess of \$1,400,000 under these circumstances violates KMS Morris' Constitutional due process rights.

The Receiver brought this specific issue to the attention of the Commission during the pendency of this proceeding in (1) its Response to Staff's Post-Hearing Brief (pp. 1-3), filed on March 26, 2004, (2) Respondent's Brief on Exceptions to Proposed Order (pp. 2-11), filed on April 6, 2004, and (3) Respondent's Reply in Support of Brief on Exceptions to Proposed Order (pp. 1-2), filed on April 12, 2004. The Receiver adopts the arguments contained in the above-referenced pleadings.

By way of summary, the Receiver objects to the Commission's adjudication of the amount of tax credits allegedly owed to the State and an assessment of that amount because such relief was not requested by Staff in the Staff Report and it was not sought or contemplated in the Commission's Initiating Order. The only relief ever sought by the Staff Report and Initiating Order, upon a finding that KMS Morris failed to comply with the Qualifying Order, was revocation of KMS Morris' QSWEF status.

The Order itself acknowledges this. It provides "The Staff report does not explicitly request tax credit reimbursement. Similarly, the initiating Order, which adopted the terms of relief requested in the Staff Report, does not specifically state that a judgment requiring reimbursement was one of the potential penalties to which KMS Morris was subject in this proceeding." Order at 6. The Commission's analysis should have stopped there. In the absence of a request for monetary relief by Staff, the monetary award in excess of \$1.4 million is a direct violation of KMS Morris' Constitutional due process rights.

The Receiver also wishes to clarify certain inaccuracies in the Order. On page 6, the Order states,

Both the Staff Report and the initiating Order state that the failure to establish the tax credit reimbursement fund was a principle reason for initiating the case. . . . From the initiating [O]rder, it is clear that the purposes of investigating the Respondent included determining if it had ignored its statutory responsibility to set up a tax credit reimbursement fund. Directing KMS Morris to comply with the statute and to put the required amount in the fund flows from that determination.

Clearly, the purpose of the Staff Report was to recommend opening an investigation to determine whether KMS Morris complied with the Commission's direction to establish a reimbursement

assessment of such credits and (2) that the Commission grant such other and further relief in KMS Morris' favor as deemed appropriate.

Respectfully Submitted,

**LE PETOMANE VI, INC., not
individually, but solely as the duly
appointed Receiver**

Louis D. Bernstein
Theodore F. Kommers
Gould & Ratner
222 N. LaSalle Street, Suite 800
Chicago, IL 60601
(312) 236-3003

By: Theodore F. Kommers
One of its Attorneys

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	
KMS Morris Power, Inc.	:	
	:	03-0607
Investigation of compliance with Order	:	
granting QSWEF status and with	:	
Sec. 8-403.1 of the Public Utilities Act	:	

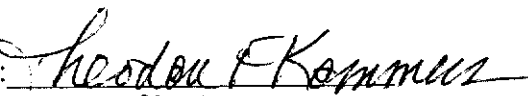
NOTICE OF FILING

To: See Attached
Certificate of Service List

Please take notice that on May 26, 2004, we forwarded for filing with the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, the attached **Respondent's Application for Rehearing**, in the above captioned matter.

Respectfully Submitted,

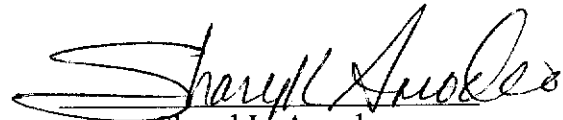
**LE PETOMANE VI, INC., not
individually, but solely as the duly
appointed Receiver**

By: 
One of its Attorneys

Louis D. Bernstein
Theodore F. Kommers
Gould & Ratner
222 N. LaSalle Street
Suite 800
Chicago, Illinois 60601
(312) 236-3003

CERTIFICATE OF SERVICE

I, Sharyl L. Amodeo, a non-attorney, state, pursuant to §1-109 of the Code of Civil Procedure, that I caused copies of **Respondent's Application for Rehearing**, upon the ICC located at 527 East Capitol Avenue, Springfield, Illinois 62701, via overnight mail, and to the remaining persons on the service list via electronic mail and regular mail, this 26th day of May, 2004, before the hour of 5:00 p.m.


Sharyl L. Amodeo

SERVICE LIST

Administrative Law Judge Bernadette Cole
Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, IL 60601
bcole@icc.state.il.us

Richard E. Favoriti
Office of General Counsel
Illinois Commerce Commission
160 North La Salle Street, Suite C-800
Chicago, IL 60601-3104
<mailto:rfavoriti@icc.state.il.us>

Sarah Burke & James G. Richmond
Greenberg Traurig, P.C.
77 W. Wacker Dr., Ste. 2500
Chicago, IL 60601
<mailto:burkes@gtlaw.com>
<mailto:richmondj@gtlaw.com>

Tom Griffin
Case Manager
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601
<mailto:tgriffin@icc.state.il.us>

Administrative Law Judge Terrence Hilliard
Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, IL 60601
thilliard@icc.state.il.us

Darryl Bradford – Vice President
Commonwealth Edison Company
P.O. Box 805379
Chicago, IL 60680-5379
darryl.bradford@exeloncorp.com

Joseph L. Lakshmanan & Shig W. Yasunaga
Asst. General Counsel
State Regulatory
500 S. 27th St.
Decatur, IL 62521-2200
mailto:joseph_lakshmanan@illinoispower.com
mailto:shig_yasunaga@illinoispower.com

Michael S. Pabian
Paul B. Wright
General Counsel – Regulatory
Exelon Business Services
10 S. Dearborn St., 35th Floor
Chicago, IL 60603
michael.pabian@exeloncorp.com
paul.wright@exeloncorp.com

G. Darryl Reed
Commonwealth Edison Company
Sidley Austin Brown & Wood
Bank One Plaza
10 S. Dearborn St., Suite 5400 SW
Chicago, IL 60603
gdreed@sidley.com

Elizabeth A. Rolando
Chief Clerk
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
erolando@icc.state.il.us

David Borden
Steve Knepler
Illinois Commerce Commission
160 N. LaSalle Street -- Suite C-800
Chicago, IL 60601-3104
dborden@icc.state.il.us
sknepler@icc.state.il.us

John C. Feeley
Vladan Milosevic
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, Illinois 60601
jfeeley@icc.state.il.us